BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IGNACIO ROJAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,314
PRAIRIELAND PROCESSORS, INC.	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
ITT HARTFORD	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the Award dated June 3, 1996, entered by Special Administrative Law Judge Michael T. Harris. The Appeals Board heard oral argument on October 22, 1996.

APPEARANCES

Michael L. Snider of Wichita, Kansas, appeared for claimant. Kasey Alan Rogg of Wichita, Kansas, appeared for respondent, a qualified self-insured. Richard J. Liby of Wichita, Kansas, appeared for the insurance carrier, ITT Hartford.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The Appeals Board also considered the deposition transcript of Karen Terrill dated April 24, 1996.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits for a 4.5 percent whole body functional impairment for the period from June 20, 1994, through July 21, 1995. For the period commencing July 22, 1995, the Special Administrative Law Judge awarded claimant permanent partial disability benefits for a 27.5 percent work disability. The Judge also found ITT Hartford had no liability in this proceeding because its coverage began after the date of accident. The only issue raised before the Appeals Board on this review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified to award claimant permanent partial general disability benefits for a 10 percent work disability for the period commencing July 22, 1995. In all other respects, the Award should be affirmed.

The Special Administrative Law Judge found claimant's date of accident to be on or about June 20, 1994. Because that finding is not disputed, the Appeals Board adopts it as its own. The Appeals Board also adopts the Special Administrative Law Judge's conclusion that ITT Hartford has no liability in this proceeding.

The only issue raised before the Appeals Board is the nature and extent of claimant's disability. The parties have stipulated claimant has sustained a 4.5 percent whole body functional impairment as a result of his June 1994 work-related accident involving the neck and left shoulder. Also, the parties have stipulated claimant's average weekly wage on the date of accident was $372.10.

Respondent contends claimant's permanent partial disability should be limited to his functional impairment rating because at the time of regular hearing claimant was working for a temporary employment agency allegedly earning more than 90 percent of his pre-injury average weekly wage. In the alternative, respondent contends claimant's award should be limited to the functional impairment rating because it closed its Wichita plant and offered claimant a job in Arkansas City, Kansas. On the other hand, claimant contends his job with the temporary employment agency lasted only three months and paid only $7.50 per hour, as compared to the $9.25 per hour he was earning on the date of accident. Claimant also contends it is unreasonable to require him to accept employment in Arkansas City as it either would require him to drive 120 miles daily or uproot his employed wife and school age children. The Special Administrative Law Judge found the plant closing analogous to a general layoff and found a work disability beginning July 22, 1995, the day after claimant ceased working for respondent due to the plant closure.

The Appeals Board finds on the date of accident claimant was working for respondent as a loin deboner and earning $9.25 per hour. As a result of that work, claimant injured his left shoulder and neck. Despite his injuries claimant continued to work for respondent in accommodated jobs until it closed its Wichita plant on July 21, 1995, to relocate in Arkansas City. In conjunction with the plant closing, respondent offered claimant employment in Arkansas City. Respondent's offer also included a $6 per day mileage allowance for eight weeks and a $400 moving expense allowance. Respondent memorialized the job offer in its letter to claimant dated November 13, 1995. Claimant declined the offer.

At the time of regular hearing in January 1996, claimant was working in Wichita for another employer, Dold Foods, as a temporary employee earning $7.50 per hour. At that time claimant was working 40 hours per week and "sometimes" an additional 4 or 5 hours on Saturdays. Claimant began his temporary job with Dold sometime before respondent's vocational rehabilitation counselor, Karen Terrill, interviewed claimant on November 9, 1995. In addition to not being required to either move or commute to Arkansas City, claimant preferred working for Dold over respondent because he believed he had an opportunity to become a full-time employee and, therefore, an opportunity to obtain the fringe benefits Dold provided, which he perceived to be better than those offered by respondent. In addition, claimant believed his job with Dold Foods operating a skinning machine was easier and lighter than the work he performed for respondent.

The record does not indicate whether claimant's hope of becoming a full-time employee of Dold Foods came to fruition. Claimant's request for the Appeals Board to consider the letter from Dold Foods attached to its brief to the Appeals Board must be denied as the letter was not properly introduced into the evidentiary record to be considered by the Administrative Law Judge. *See* K.S.A. 44-555c, as amended, which restricts Appeals Board review to the issues and record before the Administrative Law Judge.

Respondent argues this is not a work disability case because claimant declined the job offer to work in Arkansas City and the principles apply which were set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). The Appeals Board disagrees. The Appeals Board finds claimant's refusal to accept respondent's job offer for work in a community 60 miles away was reasonable under the circumstances and also that claimant was not attempting to wrongfully manipulate his workers compensation benefits. Under these circumstances, Foulk is not applicable.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee

> performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Appeals Board finds claimant's post-injury average weekly wage is $300. That conclusion is based upon claimant's regular hearing testimony that Dold paid him $7.50 per hour and that he was working 40 hours per week and sometimes an additional 4 or 5 hours on Saturdays. The Appeals Board is cognizant that the $300 average weekly wage figure does not account for overtime. However, the record does not contain sufficient evidence to calculate a weekly overtime average.

Comparing claimant's $372.10 pre-injury wage to the $300 post-injury wage, as required by K.S.A. 44-510e, yields a difference of 19 percent.

Board-certified neurologist, Calvin G. Olmstead, M.D., examined claimant in May 1995. He testified claimant had a "muscle overuse syndrome" which he felt would disappear if the aggravating events which were causing the symptoms were removed. He placed no specific restrictions on claimant but felt a common sense approach should be used to combat the recurring pain. Board-certified orthopedic surgeon, Ely Bartal, M.D., examined claimant in December 1994. He testified claimant did not need permanent work restrictions or limitations.

The only physician to testify claimant had lost the ability to perform any work tasks as a result of his work-related injury was board-certified physical and rehabilitation physician, Jeanette C. Salone, M.D. She examined and evaluated claimant in August 1995 and diagnosed myofascial pain in the left shoulder and left cervical areas which she believed was due to overuse. In Dr. Salone's opinion, claimant should restrict his work to the medium to heavy categories as he could occasionally lift 75 pounds, frequently lift up to 35 pounds, and constantly lift up to 15 pounds. Also, the doctor believed claimant should restrict pushing and pulling to 50 pounds and perform no repetitive overhead reaching or repetitive forward reaching. Based upon the document prepared by claimant's counsel and which was offered as claimant's Exhibit No. 3 to the doctor's deposition, Dr. Salone testified claimant had lost the ability to perform 66 percent of the tasks listed in that document. However, on cross-examination Dr. Salone admitted she did not discuss specific job tasks with claimant when she evaluated him. Although the Special Administrative Law Judge found Dr. Salone's testimony regarding work restrictions credible, the Judge was troubled by the doctor's testimony regarding task loss. Therefore, the Special Administrative Law Judge utilized the task loss opinion provided by Ms. Terrill.

The Appeals Board is also troubled with Dr. Salone's task loss opinion. Claimant was not asked at any time to review the list of tasks which forms the basis for Dr. Salone's opinion and, therefore, the document lacks foundation whether it correctly portrays the work tasks claimant performed over the 15-year period preceding the date of accident. Counsel timely objected to the admission of the document at Dr. Salone's deposition and the Appeals Board finds that the objection was proper. Further, the descriptions of the various tasks contained in the document vary from the tasks described by Ms. Terrill, such evidence being properly introduced. Dr. Salone was not asked to review Ms. Terrill's task list and provide an opinion of task loss.

Karen Terrill indicated claimant performed the following tasks over the 15-year period preceding the date of accident which are described more fully in her deposition.

1. Deboned meat.
2. Operated whizzard knife.
3. Operated drill to cut holes in rock.
4. Assembled pipe.
5. Slit cows ... removed lower front legs.
6. Fueled trucks, provided basic service.
7. Washed trucks.
8. Changed and repaired tires.
9. Split cows.
10. Fed horses.
11. Took care of horses.
12. Cleaned stables.

The document Dr. Salone reviewed listed the following as job tasks:

Job Position: Meat Packing Plant Lineworker, 1988-1995

1. Pushing and pulling 100 pound pieces of meat occasionally.
2. Constant, repetitive forward reaching with a hook and knife on a meat cutting line.
3. Repetitive overhead reaching to throw meat bones on an overhead conveyor.

Job Position: Construction Laborer

1. Gluing together plastic pipes weighing 10 to 15 pounds.
2. Frequently lifting a jackhammer weighing 100 pounds to break up concrete or asphalt.
3. Frequently lifting a posthole digger weighing 50 pounds.

Job Position: Truck Stop Gas Station Attendant

1. Constantly pumping fuel into trucks or cars with a five pound nozzle and hose.
2. Frequently lifting semi-tractor and trailer truck tires weighing 60 to 80 pounds.
3. Frequently reaching overhead with a spray device to wash down semi-tractor trucks and trailers.

Considering Dr. Salone's testimony, the Appeals Board finds that claimant should observe some work restrictions and limitations as a result of the June 1994 accident. The Appeals Board also finds that claimant has sustained some task loss as a result of the work-related injury. However, claimant has failed to prove the extent of the task loss. That conclusion is based upon the finding that Dr. Salone's task loss opinion is neither credible nor persuasive because it is based on facts not admitted into evidence. Because the extent of claimant's task loss has not been proven, the task loss prong of K.S.A. 44-510e should be considered zero.

As required by K.S.A. 44-510e, the Appeals Board averages the 0 percent loss of ability to perform work tasks with the 19 percent difference in pre- and post-injury wages and finds claimant has a 10 percent work disability for the period commencing July 22, 1995. The award of permanent partial general disability benefits based upon the stipulated 4.5 percent whole body functional impairment for the period before July 22, 1995, is affirmed. Before July 22, 1995, claimant was working and earning wages comparable to those he was earning on the date of accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris, dated June 3, 1996, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ignacio Rojas, and against the self-insured respondent, Prairieland Processors, Inc., for an accidental injury which occurred June 20, 1994, and based upon an average weekly wage of $372.10 for 18.68 weeks at the rate of $248.08 for a 4.5% permanent partial disability through July 21, 1995, and commencing July 22, 1995, 22.82 weeks at the rate of $248.08 for a 10% permanent partial disability, making a total award of $10,295.32, which is ordered paid in one lump sum less any amount previously paid.

The Appeals Board adopts as its own the remaining orders as set forth by the Special Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Kasey Alan Rogg, Wichita, KS
Richard J. Liby, Wichita, KS
Administrative Law Judge, Wichita, KS
Philip S. Harness, Director